No. 2564

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Appellant,

vs.

ST. PAUL, MINNEAPOLIS and MANITOBA RAILWAY COMPANY, a Corporation, and GREAT NORTHERN RAILWAY COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES.

The action in which this appeal is taken was brought by the United States to annul a patent to certain land in Flathead (now Lincoln) County, Montana. It may be remarked that the case was first brought in the name of the United States in its own behalf and on behalf of certain alleged mineral claimants, and, on a demurrer to the original bill of complaint, under the old practice, Judge Rasch, then presiding in

this district, held that the proviso to the statute of limitations of 1896, hereinafter cited, barred the suit, as far as the interests of the United States were concerned, but that the statute would not apply in so far as the United States were suing in behalf of, and as trustee for, the alleged mineral claimants, who pretended to desire to acquire the title under the mining laws.

Thereafter the alleged mineral claimants filed a disclaimer, and thereupon the United States filed an amended bill, seeking to have the patents annulled for the benefit of the United States, and to this bill, under the new practice, we interposed a motion to dismiss, on the ground that the bringing of the suit was forbidden by the act of 1896 in question.

By reason of the simpler form which the suit has now assumed, much that was pertinent in the briefs in the suit as originally brought is, it seems to us, immaterial here, and hence we assume that we will not be required to re-argue any of the matters presented at the hearing below, other than those now summarized.

A.

NATURE OF ACTION AND GROUNDS OF MOTION TO DISMISS.

The action, as stated, was brought by the United States against the St. Paul, Minneapolis and Manitoba Railway Company and the Great Northern Railway Company to annul a patent

to certain lands comprising something over one hundred acres in Flathead (now Lincoln) County, Montana, which lands had been theretofore selected by and patented to the Manitoba Company under the Act of August 5th, 1892, 27 St. 390, granting to the Manitoba Company the right to select lieu lands in lieu of certain Dakota lands which had been relinquished by the Manitoba Company to the United States, because of the failure of the government and its officers to withdraw the same from sale and entry, whereby confusion was caused by reason of the conflicting claims made by the Manitoba Company and the settlers upon those lands induced by the omissions of the government officers, which confusion was only relieved by the Manitoba Company relinquishing the Dakota lands to the government, as aforesaid, in return for the lieu land grant of August 5th, 1892.

It is charged in the bill that, by the Act of August 5th, 1892, constituting the Manitoba Company's lieu land grant, the company was authorized to select in return for the relinquishment of the Dakota land "an equal quantity of non-mineral lands, so classified as non-mineral at the time of the actual government survey, which has been, or shall be, made of the United States." The bill avers that, by this act, the company was authorized to select only lands which were non-mineral in fact, but that the lands in question in this suit were in fact mineral, and

known to be such by the Manitoba Company, which, however, fraudulently and falsely represented them to be non-mineral and, by fraud and imposition upon the government, obtained the lieu land patents now sought to be annulled.

The Manitoba Company, and the Great Northern Company as its successor in interest, have moved to dismiss the amended bill for want of equity and on general grounds. In addition the motion to dismiss specified that the bill shows upon its face that it is filed in violation of the provisions of the Act of March 2nd, 1896, 29 Sts. 42, defining the time within which, and the conditions under which, suits to annul land patents may be brought and providing that "No suit shall be brought or maintained, nor shall recovery be had for lands, or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government, or its officers to withdraw the same from sale or entry." In reliance upon this proviso of the statute, the motion to dismiss specifies in the language of the statute:

"4. It appears from said amended bill of complaint that the lands described in said amended bill of complaint, the patent to which the complainant seeks to annul, were and are lands that were patented in lieu of other lands covered by a grant which were relinquished by the grantee in consequence of the failure of the government and its officers to withdraw the same from sale and entry; and, by said amended bill of complaint, it

appears that said suit is brought and recovery is sought by the complainant for lands that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the government and its officers to withdraw the same from sale and entry; and, by reason of the premises, the said suit, as appears from said amended bill of complaint, is brought in violation of the provisions of Chapter Thirty-nine (39) of the Acts of the Fifty-fourth Congress of the United States, approved March 2nd, 1896, 29 Stats. 42, and the same is brought without authority of law, and the complainant's alleged cause of action is barred by the provisions of said statute."

B

STATUTES INVOLVED

The motion to dismiss and the amended bill of complaint refer to two statutes, which are involved in the suit. The first is the Act of August 5th, 1892, constituting the Manitoba Company's lieu land grant; and the second is the Act of March 2nd, 1896, constituting the statute providing for the time within which, and the conditions under which, suits may be brought to annul patents to railroad lands.

(1)

The Manitoba Company's lieu land grant.

The purpose of the Act of August 5th, 1892, was to avoid the confusion following the failure of the land department to withdraw from sale and entry certain lands now within the States of North and South Dakota, which had there-

tofore been granted to the predecessors in interest of the Manitoba Company in aid of the construction of railroads. By the grant to the predecessors in interest of the Manitoba Company the United States had given in aid of railroad construction certain sections of land on each side of the lines of railway of the predecessors in interest of the Manitoba Company within the limits of the then Territory of Minnesota. Afterwards the State of Minnesota was formed, and the *western* boundary of the State as fixed by the Act creating the State, was some miles to the *east* of the former western boundary of the Territory of Minnesota. The intervening strip constituting the western portion of the Territory was thus cut out of the land taken to form the State and was added to Dakota Territory.

The Land Department erroneously took the position that, as the grant to the predecessors in interest of the Manitoba Company comprised sections on each side of the railways only in the Territory of Minnesota, it followed that, upon the formation of the State of Minnesota, those railways lost the right to the lands in the western part of the Territory of Minnesota when they were severed from the lands taken to form the State and were made a part of Dakota Territory. The officers of the government accordingly held that these lands thus added to

Dakota Territory did not pass under the grant and declined to withdraw the same from sale or entry. Thereupon settlers entered upon these lands and in many instances obtained patents to them under the homestead and other land laws.

In the meantime, the Manitoba Company, as successor in interest of the railroad companies brought suits to have some of these settlers evicted and judgment was finally rendered by the Supreme Court of the United States, adjudging that these lands passed under the grant in aid of the railroads, and deciding that the settlers might be evicted.

St. P., M. & M. Ry. Co. vs. Phelps,
137 U. S. 528; 11 Sup. Ct. 168.

To avoid this threatened danger the Act of August 5th, 1892, was passed, providing that the Manitoba Company, as successor in interest, should relinquish to the United States these Dakota lands, which had thus been settled upon and even patented in some cases because of the failure of the government and its officers to withdraw them from sale and entry, and that, upon such relinquishment being made, such settlers and patentees should be entitled to the lands in the same manner as if such lands had not been previously granted in aid of railroads. The Act also provided that in return for this relinquishment "The said railway company is hereby permitted to select in lieu of" said relin-

quished lands "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey which has been, or shall be, made of the United States."

This history of the Manitoba Company's lieu land grant is sufficiently set forth in its preamble, which reads as follows:

"Whereas under the rulings of the General Land Office the extension into Dakota Territory, now States of North Dakota and South Dakota, of the limits of the grants of land made by Congress to aid in the construction of the several lines of railroad now owned by the Saint Paul, Minneapolis and Manitoba Railway Company was denied, and in consequence of said rulings lands within the limits of the said grants in the said States have been claimed, settled upon, occupied, and improved by numerous persons in good faith under color of title or of right to do so derived from the various laws of the United States relating to the public domain, and are now claimed by them, their heirs, or assigns, and many of said lands have actually been patented to such occupants or to their grantors; and

Whereas under recent construction of said grants the said occupants, improvers, or purchasers, are liable to be evicted from their holdings; Now, therefore, for the purpose of relieving the said occupants, improvers, and purchasers of the said granted lands from the hardship of being now deprived of the same under the circumstances aforesaid," etc.

As the lands, the patents to which the government now seeks to annul, were thus patented to the Manitoba Company, as appears from the bill of complaint, by virtue of lieu land selec-

tions under the provisions of this Act, it clearly appears that they (the Flathead County lands here involved) are "lands * * * that were certified or patented in lieu of other lands (Dakota lands) covered by a grant (to the predecessors in interest of the Manitoba Company) which were * * * relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry," they thus come clearly within the proviso of the Act of 1896 forbidding the maintenance of suits to annul patents to such lieu lands.

(2)

The statute fixing the time within which, and the conditions under which suits may be brought to annul railroad land patents.

This last statute, the Act of March 2nd, 1896, is the second statute herein involved, and by reason of the necessity of examining its various provisions because of the contentions of the government, and for the convenience of the Court, it is here quoted in full; the priviso with which we are concerned being capitalized:

"CHAP. 39. An Act To provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA

IN CONGRESS ASSEMBLED, That suits by the United States to vacate and annul any patent to lands *heretofore* erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents *hereafter* issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands *held* by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed; PROVIDED, THAT NO SUIT SHALL BE BROUGHT OR MAINTAINED, NOR SHALL RECOVERY BE HAD FOR LANDS OR THE VALUE THEREOF, THAT WERE CERTIFIED OR PATENTED IN LIEU OF OTHER LANDS COVERED BY A GRANT WHICH WERE LOST OR RELINQUISHED BY THE GRANTEE IN CONSEQUENCE OF THE FAILURE OF THE GOVERNMENT OR ITS OFFICERS TO WITHDRAW THE SAME FROM SALE OR ENTRY.

SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously *patented or certified* shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the

title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands *patented or certified* to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress.

SEC. 3. *That if at any time prior to the institution of suit* by the Attorney-General to cancel any patent or certification of lands erroneously *patented or certified* a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any *patented or certified* land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification, for said land until such claim is investigated in said Department of the Interior; and if it shall appear

that such person or corporation is a bona fide purchaser as aforesaid, or that such person or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified." (Approved, March 2nd, 1896.)

C

THE POSITION TAKEN BY THE GOVERNMENT.

It has always, of course, been conceded by the government that the lands involved in this suit are (in the exact language of the proviso in the Act of March 2nd, 1896) "lands that were certified or patented in lieu of other lands covered by a grant which were relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry," but an effort was made in the argument to escape the apparently clear prohibition of the statute upon five grounds.

First, it is urged that the proviso refers to lands "patented" and hence it is argued that the proviso is limited to patents issued prior to the passage of the Act; it is said that the proviso is retrospective in its operation and not prospective.

Second, it is said that the amended bill of complaint alleges a case of fraud; that fraud

vitiates all transactions, and hence that the statute was not intended to apply to cases of fraud.

Third: It was argued that the history of the legislation shows that it was aimed at a particular condition and that it was not intended to apply to the present case; hence, though admittedly within the letter of this law, the case is not within its spirit.

Fourth: It was argued that the proviso is intended to refer to lieu lands patented by the government officers absolutely without authority of law, and not to patents issued under any Act of Congress. It is said, in the brief filed by the government, that "there is nothing to indicate that Congress had in view a selection authorized by an Act of Congress and which, if otherwise regular, needed no statute of limitations for its protection," and that "the proviso was intended to apply only to lands which the company had no right under the law to select."

Fifth: It was contended that the whole matter is controlled by the repeated declarations of the government, and its well-known all pervading policy, that mineral lands shall not be acquired except in accordance with the mineral laws, and that, therefore, the statute must be construed in the light of the government's policy regarding the acquisition of mineral lands, and it is contended that, as the selection of mineral lands under a railroad grant would be a selection not authorized by law, a patent to such lands

under a railroad grant would be void and the proviso must be construed to refer only to patents which could lawfully be issued. It is said that by the act in question Congress "intended to protect patents which were by law authorized to be issued," but not "when such patents had been unlawfully issued." Again it is said that "Congress intended to protect patents from attack for any mistake or irregularity of officers acting within the scope of their authority," and that apparently in passing upon the mineral or non-mineral character of land the officers are not acting within the scope of their authority.

We may remark at the outset that these quotations from the Government's brief show that the fourth and fifth grounds are inconsistent.

D

ARGUMENT.

I

The Statute Applies to All Patents and Is Not Merely Retrospective in Its Operation.

The first contention made by the government was that the proviso is only retrospective in its operation and does not apply to patents issued after the passage of the act. The proviso declares that, "no suit shall be brought or maintained for lands that were *"certified or patent-*

ed" in lieu of other lands which were relinquished by the grantee in consequence of the failure of the government, or its officers to withdraw the same from sale or entry."

It is urged by the government that the proviso declares that suits shall not be brought for lands *"certified or patented"* in lieu of other lands. It is said that the expression "certified or patented" is in the past tense, and hence the proviso can refer only to lieu land patents issued in the past—prior to the passage of the act.

But even *if it be conceded that the words* "certified or patented" *are in the past tense,* this is not at all decisive of the matter, as *the question then arises from what point of time does it relate back.* To say that it refers to the date of the passage of the act, and that the proviso refers only to lieu lands "certified or patented" *prior to the passage of the act* is to beg the question. We contend that even with an admission that the proviso is in the past tense it forbids the initiation of any suit "for lands certified or patented" *prior to the institution of the suit.*

The *same expression* "patented" *occurs in other portions* of the statute defining the policy of the government in suits to annul railroad land patents. To hold, therefore, that the expression speaks only from the date of the passage of the act, and not from the date of the institution of the suit, would too seriously impair the efficien-

cy of the somewhat elaborate system established by this act for the protection of bona fide purchasers.

For example, in section 2, the act provides that "if any person claiming to be a bona fide purchaser of any lands *"patented or certified"* shall prove his claim to the satisfaction of the Secretary of Interior, suit shall not be brought for the recovery of the lands *"patented or certified"* but only "against the patentee or the person for whose benefit the certification was made" for the recovery of the *value* of the land. The same section provides that "any bona fide purchaser of lands *"patented or certified,"* if he has not presented his claim to the Secretary of Interior, may establish his right in the suit.

As another example, by section 3, it is provided that if, before suit, a claim is filed with the Secretary of the Interior by a person claiming to be a bona fide purchaser "of any *patented or certified* lands" by virtue of a deed or otherwise from the original patentee, suit shall not be brought for the recovery of the lands until the land department has investigated the claim, and, if the claim is found to be just, no suit shall be brought against the bona fide purchaser, but only against the patentee to recover the value of the land.

Note, also, that immediately preceding the proviso is a direction that "no patent to lands *held"* by a bona fide purchaser shall be annulled.

It will scarcely be contended that these elaborate provisions for the protection of bona fide purchasers relate only to lands patented before the passage of the act, and yet in each case the words "patented or certified" are used. In these sections the act says that, under certain contingencies, no suit shall be brought against a bona fide purchaser of lands "patented or certified:" in the proviso the act provides that no suit shall be brought for lands that were *"certified or patented"* as lieu lands for relinquished lands. Why should the words *"certified or patented"* in one case be construed properly as applicable to lands "certified or patented" before or after the passage of the act, but in the other case only to lands "certified or patented" prior to the passage of the Act? *Since* it is conceded that, in these various sections of the act, *the words "patented or certified" relate back,* not from the date of the passage of the act, but *from the date of the institution of the suit, it follows* that the words *"certified or patented" must have the same effect in the proviso, and refer to* lands "certified or patented" at *any time prior to the commencement of suit.*

Even if it is conceded that these expressions indicate the past tense, the question still remains, as stated, whether the implication is that the tense speaks from the date of the passage of the act, or from the date of the institution of the suit. If the statute is to be amplified, it is more

natural, in view of its general scope and the plain intention to establish *a rule of continued policy,* that the additional words qualifying "certified or patented," by implication, should be "prior to the institution of suit" rather than "prior to the passage of this act."

That this is correct seems to be indicated also by the fact that in the 3rd section, where Congress takes perhaps greater care to specify the time from which the past tense is to be deemed to speak, it will be noticed that the act directly refers to "any time prior to the institution of suit."

In this connection also we note that the last event mentioned in the proviso prior to the words "certified or patented" is the institution of a suit, and, therefore, even if doubt existed on the theory that the statute did not expressly state the time from which the words certified or patented should relate, and construction was necessary, *those words* would, *under a well-known rule of grammatical construction, refer back to the event last specified* before the words "certified or patented," to-wit: the institution of a suit. The proviso says that "no suit shall be brought for lands that were certified or patented in lieu of other lands" etc. of the character discussed. *The last event specified is the institution of a suit, and hence these words "certified or patented" must be construed to speak from*

the time of the last event mentioned, to-wit: the bringing of a suit.

Moreover, *if it was the intention* of Congress to limit the operation of the proviso to patents issued prior to the passage of the act, *the expression used, "lands that WERE* certified or patented," *is not an apt one. The more natural, and* in fact the *only technically grammatically correct expression* to convey this meaning *would have been "lands that* HAVE BEEN certified or patented." It is inconceivable that if Congress had intended the proviso to operate only retrospectively, this last usual and technically correct expression, referring to lands that have been certified or patented, would not have been used. The failure to use this expression is, therefore, a strong argument against finding in the statute an intention that it, or the proviso, shall be limited only to a retrospective operation. To express such an intention the words "WERE PATENTED" are awkward, and, for reasons now to be stated, are also grammatically incorrect; to express such an intention the words "HAVE BEEN PATENTED" would be fluent and technically accurate.

Note, that, in the only instance where the act was intended to operate retrospectively only, express reference is made to "patents heretofore issued."

We have assumed so far that the government is correct in its contention that the statute, by

reason of the use of the words "patented or certified" is in the past tense, and we have endeavored to show that teven then the past tense speaks, not from the passage of the act, but, from the time of the institution of suit. *But,* in fact, the act is not expressed in the past tense. *The proviso is worded in the imperfect, not the past tense. The expression used* is not simply "certified or patented," but *"were* certified or patented," which necessarily indicates the imperfect tense, and *refers,* therefore, *to a continuing course of conduct.* This, in fact, is the only tense, and the only expression which would be grammatically proper to express the intention which we are contending has been expressed, to-wit: a continuing course of conduct, a continuing governmental policy applicable not only to patents previously issued, but to all patents whenever issued, a complete system covering the subject of railroad patents.

The imperfect tense is thus defined in the Century Dictionary:

Imperfect:

Adj. in gram.: Designating incomplete or continuous action, or action or *condition conceived as in progress* when something else takes place.

Noun: in gram.: An imperfect tense; a *past continuous tense.*

If the proviso had been intended to refer only to patents issued prior to the passage of the act

it should be noted that this meaning cannot be made grammatical by inserting in the proviso, as actually drawn, or merely adding, a few words expressive of that intention. For example, the proviso would not be grammatically correct if we should add an express declaration of such an intention, by changing the proviso, by addition, so that it would read as follows:

"But no suit shall be brought or maintained for lands that *were certified* or patented *prior to the passage of this act* in lieu of other lands," etc.

The use of the imperfect tense instead of the past tense in this instance would be grammatically incorrect.

In order to express such an intention, it is necessary not only that an addition be made to the proviso, but also that it be redrafted by the elimination of the word *"were"* and the substitution of the words *"have been,"* so that the proviso would read:

"But no suit shall be brought or maintained for lands that *have been certified* or patented *prior to the passage of this act* in lieu of other lands," etc.

On the other hand the intention which we contend is expressed might be stated with more verbosity by mere additions to the statute, without the necessity of any substitution, so that the proviso would read as follows:

"But no suit shall be brought or maintained for lands that were certified or patented prior to the institution of suit in lieu of other lands," etc.

In fact this change would be *simply a concession to verbosity* and the proviso, as so modified, would not be clearer; as actually drawn the proviso expresses this exact intention in concise form and with strict regard to grammatical construction.

The entire statute is plainly intended to constitute a continuing governmental policy, to establish a system applicable to a course of future events and to all cases of patents to railroad lands. This is especially plain and *expressly* provided in the proviso by the use of the word "were," which indicates the imperfect tense, and therefore a course of conduct or events, and the same tense is *implied* by the use of the words "patented or certified" in other portions of the statute.

The government itself in its brief declares that Section 1 of the Act of 1896 is divided into four parts. First, it provides the time within which patents issued prior to the act may be set aside. Second, it provides the time within which patents issued after the passage of the act may be set aside. Third, it then protects the title of bona fide purchasers, and clearly this refers to lands patented as well after as before the passage of the act. Fourth, there is the proviso in question which, with equal clearness, refers to lands patented as well after as before the passage of the act. The government's own summary or detailed analysis of the section thus

shows that the first subdivision relates to patents issued before, the second subdivision to patents issued after, and the last two subdivisions to patents both before and after the passage of the act.

A reading of the section indicates the progress of the legislative mind from limited, confined fields to general, unbounded areas. Thus, first it confines its attention to prior patents. Then it progresses to the second field, or future patents, and, finally, having covered these limited areas, it progresses into the domain of a continuing policy applicable to all patents, past or future, by protecting all bona fide purchasers and by protecting lieu land patents of the peculiar character here involved.

In the first two subdivisions Congress was careful to distinguish between prior and future patents. Certainly the government will concede that in the third subdivision these restrictions had been abandoned, and that the legislative attention was then directed to patents generally. What ground is there for assuming that *in then progressing* from the third to the fourth subdivision *Congress was reverting* to the first.

To carry out the government's construction the orderly arrangement would have been to have inserted the proviso in the first subdivision. The fact that the proviso was not made a proviso only to the first subdivision shows that

it did not belong there, and was not intended as a limitation only upon the first subdivision. Its place at the end of the section makes it, by its position, a proviso modifying not merely limited portions of the section, but modifying the entire section, as well the portions of the section relating to future patents, as the portion relating to past patents.

Our view as to the meaning of the words of the proviso is thus strengthened by its position in the section as a proviso to the entire section, and not as a proviso to any single portion. To sustain the government's contention it is thus necessary in logical and orderly procedure to change the wording of the proviso and also its position in the section, so that the section would read:

"That suits to vacate any patent to lands heretofore issued shall be brought only within five years from the passage of this act; provided that no suit shall be brought for lands that have been certified or patented in lieu of other lands relinquished by the grantee in consequence of the failure of the government to withdraw the same, and suits to vacate patents hereafter issued shall only be brought within six years after the date of the issuance of such patent, but no patent to any lands held by a bona fide purchaser shall be vacated."

There is no authority in law for the judicial branch thus reediting in this double aspect the work of the legislative branch. Any meaning can be found in any statute if we are thus per-

mitted to substitute words and rearrange their positions. Greater violence could not be done towards any statute than is asked by the appellant in this case.

It is, therefore, literally true that, if Congress intended to express the intention now suggested by the government, Congress has failed to use the most natural expression (lands that *have been* patented) for that purpose, and, in fact, the only expression that grammatically could be used to express that intention, and at the same time has used an expression (the imperfect tense; lands that "*were* patented") that grammatically is incapable of expressing that intention, and Congress has likewise failed to place the proviso in an orderly position immediately after the first subdivision, and has given it a position as a proviso to the entire section.

On the contrary, if Congress had intended to express the intention that the proviso should establish a continuing governmental policy, applicable to all patents issued in the course of time, Congress has used the only expression (the imperfect tense; lands that "were patented") that grammatically is capable concisely and accurately of indicating such an intention, and has accurately placed the proviso in its logical and orderly position. To sustain the government's contention, therefore, it is necessary either to assume that the statute is not grammatically drawn, or drawn in an orderly way, or to do vio-

lence to the exact language of the statute by substituting other words in the place of those used, and to rearrange them in the section, and the court is asked to do this in spite of the fact that the proviso as actually drawn is grammatically correct, is plain in its direction and is consistent with the remaining portions of the statute, which provide, in common with the proviso, for a continuing governmental policy.

Moreover there is no reason for confining the policy of the proviso to past patents. If, for reasons hereafter to be shown, the policy declared by the proviso is only fair, honest, and just and prompted by the Government's sense of fair play between the parties, the same policy would, with equal reason, apply to future patents.

II

Are Cases of Alleged Fraud Excepted from the Operation of the Statute?

Considering next the contention that cases of fraud are excepted from the operation of the proviso, we find no reason given why such should be the case.

In the first place, there is no exception whatever expressed in the statute. The statute clearly commands that "no suit shall be brought" or maintained to annul patents to lieu lands of the character in question. It does not state that no suit shall be brought except suits founded

upon fraud, or except suits founded upon mistakes, or based upon any other less well-known ground for setting aside patents. *No express exception is stated,* and, on the contrary, *the statute* expressly negatives any exception in that it *commands that "no suit shall be brought,"* and hence if any exception is to be found it must be by reason of some fair implication as to the probable intention of the framers of the statute, which must be shown fairly to qualify, in some way, the positive direction that "no suit" shall be brought.

But *no such exception can be* justly or *reasonably implied,* for the legislature, in drafting this statute, *necessarily had cases of fraud in mind.* The statute provides the time within which, and the conditions under which, land patents may be annulled, and as *the most common grounds for annulling land patents are for fraud and mistake,* and since, in fact, it is almost impossible to suggest any ground for annulling a patent other than the grounds just suggested, we must assume that the legislature had in mind the idea of attacks being made upon patents on the ground of fraud. This is strengthened by *the provisions of the* statute *in regard to the rights of bona fide purchasers without notice of the fraud.* The whole scope of the statute shows that the main object was to fix the time within which, and the conditions under which, land patents could be

set aside on the ground of fraud. Hence, as Congress had this very subject under consideration and was expressly protecting the rights of bona fide purchasers without notice of the alleged fraud, an implication that fraud was not intended to be covered would nullify the express provisions of the statute, but, manifestly, implications can never arise antagonistic to the express direction of a statute.

Moreover, if the government is right in contending that the direction that "no suit shall be brought" excepts from its operation cases of alleged fraud, it logically and necessarily follows that the *same implication would be proper* to restrict the effect of the statute *as to its other provisions,* so that the law would read that "suits to vacate and annul patents hereafter issued, except in cases of fraud, shall only be brought within six years" etc., and thus the *entire act would necessarily become merely an act concerning* the time within which, and the conditions under which *suits* to annul land patents may be brought, *except in cases of fraud,* and the effect of a statute as a statute of repose is practically destroyed.

Another reason why no such implication is proper is found when we *consider the object of the proviso.* It must be remembered that the proviso forbidding any suit being brought to annul patents to lieu lands is limited to lieu lands "that were patented in lieu of other lands re-

linquished by the grantee in consequence of the failure of the government, or its officers, to withdraw the same from sale or entry." The lieu lands are thus lands which were patented in return for lands relinquished to correct the errors of the land department. *As the grantee relinquishes lands as to which the title was unassailable,* it is only reasonable that this act should provide that *the lieu land patents,* when issued, *should be as valid and effective as the unassailable title which was surrendered.* The proviso does not give the grantee a peculiar advantage in this class of lands. It seems to endeavor merely to restore to the grantee his estate in the relinquished land, or rather *to compensate* him for the loss of that estate, voluntarily surrendered by him, *by giving him an estate of equal validity in other lands.* It endeavors merely to place him on as good a footing as he was before he aided the government by surrendering his estate in the lands relinquished.

Take the case in hand for instance. As an inducement towards railroad construction the government had granted to the predecessors in interest of the Manitoba Company certain lands now situated in the states of North and South Dakota. Its right to these lands was questioned, and, after years of litigation, it finally established its title as valid and unassailable. This is the title which it relinquished to the government, a title fortified by expensive litigation and a de-

cree of the Supreme Court of the United States. It is now urged that the title which the Manitoba Company received to the lieu land (in return for the relinquishment of the Dakota lands, its title to which had thus been finally established) was nothing but a privilege of being sued. The more reasonable and natural position to take is that, *as the Manitoba Company gave up an unassailable title, the government intended that it should receive in return a title to the lieu lands as unassailable as the unassailable title which was surrendered.* This principle we find carried into the proviso as a sound rule of public policy. In passing this statute of repose and in defining the time within which, and the conditions under which, suits may be brought to annul land patents, the government announces as a part of its public policy that where the patent is issued in return for a title which has been shown either by lapse of time, by suit, by presumption or otherwise, to be unassailable, which title was relinquished as an aid in the correction of the errors of the government's officers, the patent to the lieu land shall be at least as unassailable as the title which was relinquished and no suit shall be brought to annul the same.

The statute defines the time within which the government may prosecute its inquiries upon, and attack the validity of the title acquired by its grantee: as regards ordinary patents that time runs from the initiation of the proceedings

in the land office until six years after the issuance of the patent; as regards lieu lands of the limited character now in question that time runs from the initiation of the proceedings in the land office until the patent is issued, but when patent is once issued, inquiries into its validity are foreclosed.

It should be noticed that in cases that come within the proviso the government officers are assumed to have already made one mistake in the disposition of the public domain, and the grantee has already been subject to inconvenience resulting therefrom, and has, after investigation and prolonged litigation, either in the land department or in the courts, relinquished lands to the government as a means of correcting the mistake of government officers. In defining its policy in regard to the bringing of suits to annul patents, it is, therefore, quite natural for the government to recognize that the railroad company in the cases mentioned in the proviso has had more than its share of litigation and dispute, and, therefore, it has announced as a rule of policy in these cases, which necessarily presuppose that one dispute has already been had and adjusted, that the grantee, after obtaining patent to the lieu lands, shall not be further annoyed by having his title to the lieu lands contested and litigated just as his title to the relinquished land was contested and litigated. The government *limits the time* within which *to in-*

vestigate and determine the validity of the grantee's *rights to* the *lieu lands to a period extending from the date of the selection to the date when the patent is issued.* During this period it may investigate to the fullest extent all matters affecting the right to make the selection, including all matters such as are charged in the bill of complaint in this case. But its conclusion in favor of the right to make the selection becomes as to it, in this limited class of cases, by virtue of this proviso, res adjudicata as soon as the patent is issued.

Of course if the judgments of human tribunals were mathematically accurate exceptions could always expressly be made in cases of fraud. *Since,* however, *judgments of human tribunals are not infallible* and are subject to very grave errors, *and since fraud cannot be mathematically proved or disproved,* and is the most difficult matter either to prove or disprove, and ingenious suspicions frequently lead to unjust judgments finding that fraud actually existed where none in fact did exist, *the law,* taking a practical view of the matter, *is full of instances where,* for reasons of policy, *the question of fraud will not be examined.* Take, for example, statutes of limitations generally, statutes of fraud requiring certain contracts to be in writing, statutes concerning wills, and many other statutes. In such cases the law does not say that fraud, or any other fact, did, or did not, exist, but declares that

policy forbids an inquiry into the subject by fallible human tribunals. In very rare instances injustice may be done, but in the great majority of cases the policy which limits inquiries by human tribunals and recognizes the danger of error is wise and justified by actual practice.

The proviso in this case, forbidding the suit which the government now seeks to maintain, contains just such a limitation, and, recognizing the possibility of error in all investigations into questions of fraud, the legislative branch has declared that no such investigation shall be conducted in any case after six years after the date of the issuance of the patent, and that, in the case of lands patented in lieu of other lands that were once patented, but were afterwards relinquished by the patentee in consequence of the failure of the government or its officers to withdraw the same from sale or entry, no suit shall be brought or maintained to annul the patent, whether on the ground of fraud, which is the most common ground, or for any other reason, but that all matters such as are charged in the bill in this case, or any other matters affecting the right to the lieu lands, must be *investigated and determined prior to the issuance of patent,* and that the issuance of the patent shall be a conclusive determination against the truth of the charges now made.

The wisdom of such legislation seems abundantly justified in the present case where it seems

that the government charges the defendant companies with actual fraud in selecting lands which the government now says were mineral in fact, though it must be conceded that, in the language of the Manitoba Company's grant, they were not classified as mineral "at the time of the actual government survey which has been or shall be made of the United States," and the court can almost take judicial notice from well-known decisions of the interior department, that, until recently, inquiries of the sort which are now sought to be made were regarded both by the railroads and by the government itself as immaterial, even where the lands were in fact mineral.

Davenport vs. N. P. Ry. C.,
32 Land Dec. 28.

N. P. Ry. Co. vs. U. S.,
176 Fed. 706 at 708.

It was formerly supposed that the classification at the time of the actual government survey constituted a conclusive rule of evidence or identification of the lands covered by the lieu land grant and, though doubtless large sums of money have been spent in reliance upon these decisions in selecting and securing patets to lieu lands, the government now seeks to charge that selections, made in perfect good faith, and with the approval of the government, were made fraudulently. A statute which forbids such an inquiry is not an unwise one, and it is indeed

unfortunate that the prohibition is not extended to all lieu lands instead of being limited to lieu lands of the character now in question.

We respectfully submit that no implication can justly be made excepting cases of alleged fraud from the operation of this statute, or of the proviso.

In fact, however, these reasons are more properly presented to a legislative department of the government as a reason why such a law should be passed, but we recognize that they are almost out of place in a discussion as to the meaning of the act in question. The act clearly provides that "no suit" shall be brought for lands that were certified or patented in lieu of other lands which were relinquished by the grantee in consequence of the failure of the government to withdraw the same from sale or entry. The statute says, without any exception, that "no suit" shall be brought, and, therefore, though the reasons why such a law is, or would be, a just one are properly presented to a legislature, they are more properly presented before such a law is passed, but, with the actual passage of the act in question, it no longer becomes necessary to discover the reasons for its passage, or for the policy there adopted, and courts, doubtless recognizing the justice of the proviso for the reasons stated, can merely rule that where the legislative branch in defining the policy of the government has stated that "no suit shall be brought," this

cannot be construed to mean that "some suits can be brought." The court by its examination of the bill of complaint ascertains that this is a suit to recover "lands (Flathead County lands) that were certified or patented in lieu of other lands (Dakota lands) that were relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry" and under the proviso "no suit" to annul such patents, no matter upon what ground, can be maintained.

Moreover, the question (if it ever was a real question) whether cases of fraud were intended to be excepted from the provisions of the act is forever set at rest by the decisions of the Supreme Court, to the effect that cases of fraud were clearly intended to be included.

U. S. vs. Chandler Dunbar Etc. Co.,
209 U. S. 447; 28 Sup. Ct. 579 at 580.

U. S. vs. Winona Etc. Ry. Co.,
165 U. S. 463; 17 Sup. Ct. 368 at 370 and 371.

The controlling principle applicable to all such questions as are here disclosed is, of course, the duty of the court to ascertain and enforce *the legislative intent,* and, if possible, to find that intent in the language in the law itself, and whenever reasonable doubt, if any, arises as to that legislative intent because of the ambiguity in the wording of the law, the court may properly search for the legislative purpose in the

general policy which is sought to be pursued, and which, though possibly in some cases, somewhat obsecure in any particular part of the law, could be discovered in the legislation as a whole. Applying these well-known rules of construction, we venture to inquire in what portion or portions of this system of legislation the court can discover any indication of intention to nullify the express prohibition of the act.

Manifestly, the railway company, sustained by the opinion of the Supreme Court of the United States, could have refused to accomodate the government and could have retained its unassailable title to the Dakota lands. We must, therefore, indulge the assumption that the government would have cheerfully agreed to tempt the railway company by assurances, in advance, that the railway company's title to lands accepted for the government's convenience should be as unassailable as the title to those surrendered, and should thereby be made as equal in quality as they were made equal in quantity to the lands surrendered. The court will hardly be able to conclude that the railway company would have accepted the terms of the proposed exchange if the government had expressly declared that the invited exchange of lands should involve perpetual litigation for the railway company as to each tract to be selected. Such a theory as to the probable policy of the government involves an injustice on the part of the government of little

less merit, if any, than the alleged fraudulent conduct so loosely charged in complainant's bill against the corporation which saved the government more trouble and expense than could be measured in the money value of the lands promised to be given in exchange. The policy on the part of the government which its representatives now contend for would have been little less than a fraudulent one, and we respectfully insist that there is no language in this statute which will justify the court in finding or declaring a carefully concealed purpose on the part of Congress to obtain from the railway company its cooperative effort to relieve the situation in Dakota and give in exchange nothing more substantial than the right in the railway company to repeat its Dakota experience in the form of endless litigation with that government which it was seeking to accommodate. We insist, therefore, that *the government* either *intended,* as shown by this law, *to make its patents for the exchange lands* unassailable as to all such lieu lands of the character here involved, or as to none, and that the proviso cannot be, by a forced construction, nullified only in part, but, if nullified at all, must be entirely nullified and that the *act of* 1896 *was plainly passed for* the purpose of *consumating in good faith those conditions of the previous adjustment which any fair minded citizen,* similarly situated, *would have considered impliedly involved in an exchange of such land.*

III

The Alleged Legislative History of the Act.

In regard to any references which have ever been made by the Government to any proceedings of Congress, it will be found these are very general and vague and that absolutely nothing can be found tending to show that the legislative branch did not mean just what it said. For instance, it is again repeated by the Government in its brief, as in the brief filed below, that the original bill before Congress provided for a strict statute of limitations but directed that "no patents to any lands held by a bona fide purchaser shall be vacated or annulled." Now counsel again say that while this bill was under consideration Mr. Hepburn of Iowa stated "that there were certain cases where the purchasers from railroad companies were entitled to protection, and he cited a case where the Interior Department held that lieu lands might be granted" in a certain instance, where afterwards the department concluded that there was no authority in law for the granting of such lieu lands. It will be found, however, that Mr. Hepburn's solicitation was that in the meantime purchasers had obtained the lands by purchase from the railroad companies. Thereupon, according to the contention of the Government, upon hearing Mr. Hepburn's objection, the Chairman of the Committee on Public Lands

submitted the proviso in question as an amendment.

It is obvious, however, that the proviso could not have been intended, in any way, to refer to Mr. Hepburn's suggestion, as Mr. Hepburn was concerned with protecting the purchasers and the original bill, as quoted by the Government, furnished ample protection to bona fide purchasers, and the proviso is drawn, not for their protection, but for the protection of the railroad companies, whose situation was certainly at least as, and indeed more, meritorious.

Besides it will at once be noted that it is doubtful whether the case which the Government says Mr. Hepburn had in mind comes within the proviso, for it is not clear that in such a case it could be contended that the lands were lost "in consequence of the failure of the government to withdraw the same"—rather it would seem the lands were lost in consequence of the failure of the railroad promptly definitely to locate its line, but we will assume that such a case does come within the proviso relating to lands "lost in consequence of the failure of the government," etc.

Even then, at most, if the instance referred to by Mr. Hepburn was an instance of land *lost,* the proviso, as finally passed, included cases of land *relinquished.* It seems clear, therefore, that even though Mr. Hepburn's remarks were not germane to the subject of the proviso, some

other members of Congress gave greater consideration to the entire subject and recognized that the corporation which had been subjected to inconvenience or loss by reason of the mistakes of the Land Department, and had come to the aid of the government, was entitled, at least, to as great protection as that already conferred in the original bill upon bona fide purchasers. The proviso, therefore, does not, in any way, refer to the subject of Mr. Hepburn's remark, is not germane to that subject, and constitutes an independent piece of legislation prompted by other motives and laying down a rule of public policy which seemed to other members of the legislative branch to be a just and moral one.

It should be noted that the position of the Manitoba Company is much more meritorious than the state of facts referred to in the Government's brief of the legislative history. Under these facts a railroad company, by reason of settlers occupying lands before the definite location of the railroad, had *lost lands* to which it was rightfully entitled, and the Land Department of the Government had *unlawfully and without statutory authority* patented to it lieu lands as *gratuitous compensation* for lands lost by reason of the railroad's perhaps excusable delay in locating its line.

The instant case, however, is not a case where the Manitoba Company had lost any lands. On the contrary, it had established its title to this

land, and the establishment of this title was embarrassing to the Government and to the settlers on the land. Thereupon, by express legislative enactment, the railroad consented to relinquish these lands, and the Land Department was authorized, in consideration thereof, to patent to it other lands in lieu thereof. It therefore *relinquished* lands to which it was rightfully entitled and to which it had established its right, and the Land Department, *lawfully, and under express statutory authority,* patented to it the lieu lands now in question.

If it is sound public policy to protect a lieu land patent to lands patented unlawfully and without authority, and as a mere gratuity or favor to the railroad company, in return for lands which, even without fault, the railroad had lost, but for the loss of which the Government, as a gratuity or favor, is willing to allow compensation in the form of lieu land, how much more does public policy require that the same protection be given to a lieu land patent to lands patented, lawfully and under express statutory authority for a valuable consideration, in return for lands relinquished by the railroad for the convenience and accomodation, and at the request of the Government, in order to relieve the Government and its citizens from embarrassment caused by the failures or omissions of its own officers?

So it is that we find that, when Congress was considering railroad grants, and it was proposed by Mr. Hepburn that bona fide purchasers of railroad lieu lands which might be patented to railroads unlawfully, as a gratuitous compensation donated by the government, in return for lands lost by the railroad, should be protected, the whole subject of railroad grants was considered, and it was appreciated that the situation of the railroad deserved consideration, especially in the case of lieu land patents, not unlawfully, but lawfully issued under express statutory authority, in return for lands not lost by the railroad's own failures, but relinquished by the railroad at the request, and for the accommodation, of the Government and its citizens.

Accordingly the act in question, having all these subjects in mind, provided that suits as to prior patents must be brought within a certain period, and suits as to future patents within another period, and that, as a continuing rule of policy, bona fide purchasers should always be protected, and that no suit should be brought to annul patents to lieu lands conveyed to purchasers, and that railroads also must be protected and no suit must be brought to vacate patents to lieu lands of the limited character here in question, to-wit: lands patented in lieu of other lands lost or relinquished in consequence of the failure of the Government and its officers to withdraw the same from sale or entry.

The inapplicability of the legislative history outlined by the Government (and in the brief here filed it is not as accurately outlined as in the brief below) is thus shown in two respects. First, Mr. Hepburn's remarks were directed to affording relief to bona fide purchasers and were not germane to a proviso affording protection to the railroad companies as well; and secondly, the instances which he cited were instances of lands lost by the railroad companies, while the proviso in question covers also lands relinquished.

We find, therefore, that in spite of counsel's diligent effort to find some aid in the record of the legislative proceedings concerning the enactment of this law, no passages are found which can, in any way, explain away or nullify the plain direction of the proviso. Moreover, it cannot be contended that, out of the entire membership of the House of Representatives and of the Senate of the United States, Mr. Hepburn was the only person whose mind operated in connection with the enactment of this law. Undoubtedly, other members of the Houses of Congress had in mind exactly the considerations which we have advanced, and their express judgment as to the policy which should be pursued cannot be nullified merely by an argument that the Congressional Record shows that one member of the House of Representatives did not feel that the original bill, which declared that "the

right and title of such bona fide purchasers is hereby confirmed," sufficiently protected bona fide purchasers.

Though it would be contended by the Government, in any particular case, that a statute which was ambiguous or unintelligible might be saved by construction and by reference to the records of Congress or to Legislative history, it would not be contended that such Legislative history could be resorted to where the statute is plain in its directions and intelligible and salutary in its actual operation.

Thomas vs. Vandegrift,
162 Fed. 645 at 642; 89 C. C. A. 437.

U. S. vs. Union Pac. Ry. Co.,
91 U. S. 72; 23 L. Ed. 224 at 228.

U. S. vs. Trans. Mo. Ft. Assn.,
166 U. S. 290; 17 Sup. Ct. 540 at 550.

For these two reasons, therefore, we maintain that the Legislative history referred to affords no escape to the complainant, because:

(1) The debates to which counsel refer have nothing to do with the proviso in question; and

(2) Such records can never be resorted to where the statute is intelligible and a reason is found for its practical operation.

IV.

Theory That Proviso Applies Only to Lands Which Company Had no Right to Select.

The Government next contended that the proviso in question was intended to apply only to lands which the company had no right under the law to select and not to lands patented under authority of law, that is to say, that "there is nothing to indicate that Congress had in view a selection authorized by an Act of Congress which, if otherwise regular, needed no statute of limitations for its protection."

It is an extraordinary assertion that a selection regularly made under an Act of Congress needs no statute of limitations for its protection. On the contrary, the Government has recognized that its officers may be over-zealous in the discharge of their duties, or may be biased or prejudiced in particular cases, or may be guilty of very grave errors of judgment, and for this reason, as already stated, because, for one reason or another, mistakes may be made and injustice done by any human tribunal, legislative, executive or judicial, the Government has stated, by the Act of '91, that, unless suits are brought to annul patents generally within a certain period, the patent shall stand forever unassailable; and by the Act of '96 a similar recognition is made and similar legislation passed as regards rail-

road patents. The Government has thus recognized that such legislation is needed as a statute of repose for the protection of all titles, and that there is no such thing as a patent "which needs no statute of limitations for its protection."

The contention that a patent regularly issued needs no statute of limitations for its protection assumes that human tribunals are infallible and declares that the whole system of legislation fixing the time within which, and the conditions under which, suits to annul land patents generally may be brought is a useless piece of legislation, and the contention involves the same criticism as regards every statute of limitations passed by the various states, for it is said that any act regularly and lawfully done needs no statute of limitations for its protection.

The language of this proviso is the same as the language of the entire Act, and the language of this Act is the same as the language of the other Acts of Congress relating to the setting aside of patents to public lands. If, therefore, the complainant is right in the astonishing declaration that "there is nothing to indicate that Congress had in view a selection authorized by an Act of Congress which, if otherwise regular, needed no statute of limitations for its protection," then it follows that there is nothing in this entire statute, or in any of the statutes fixing the time within which suits to vacate or annul patents generally may be brought,

indicating that Congress had in view a selection of lands authorized by any act of congress and which, if otherwise regular, needed no statute of limitations for its protection. Complainant must, therefore, be deemed to ask the court to hold that this proviso and the entire statute, and all of the other statutes of repose which have been passed by Congress, and in which Congress uses the same language as is here employed relating to the bringing of suits to annul land patents, are not applicable to lands patented pursuant to a selection or application authorized by law or which, if otherwise regular, need no statute of limitations for their protection, and all such legislation, according to the complainant, is limited in its application to land patents for the issuance of which there was no authority in law.

But, as the cases where patents have been issued absolutely without authority of law must be rare indeed, these statutes of repose are, by this argument, rendered practically useless.

The contrary contention was at one time made by the Government, and it was urged that these statutes, which are all couched in the same terms, did not apply to patents which were absolutely void because issued without any authority of law whatsoever and not under color of compliance with any law, but this position of the Government as regards the general statute of limitations found in the Act of '91 was denied

by the Supreme Court of the United States, and it has been held that that statute which, as stated, is in the same language as the present statute, and in the same language as the proviso here referred to, applies to all patents, even to those issued absolutely without authority of law and not under color of compliance with some law.

Chandler Co., vs. U. S.,
209 U. S. 447; 28 S. Ct. Rep. 579.

V.

Theory That Proviso Does Not Apply to Mineral or Non-Mineral Question.

The next position taken by the complainant was that the proviso must be deemed controlled by the language establishing the policy of the Government that its mineral lands shall not be disposed of except in accordance with the mineral laws, and that under agricultural grants or railroad grants mineral lands have always been excepted. It is argued that, as Congress has reserved all mineral lands from agricultural and railroad grants and has directed that mineral lands shall be acquired only under the mineral laws, Congress has established a well-known all pervading policy in regard to mineral lands which must control general statutes of limitations. And it is argued that the proviso for bidding the bringing of suits to annul lieu land patents must be construed in the light of this policy,

and is not applicable where, by reason of the mineral character of the lands, there was no authority in law to enter the same under the grant in question.

Strange to relate the Manitoba Company, in the very lands out of which this suit arises, has already litigated the theory that the express terms of a statute may be controlled by an all pervading Government policy.

Thus in the case of

St. P. M. & M. Ry. Co. v. Phelps,
137 U. S. 528; 11 Sup. Ct. 168,

already cited, wherein the Manitoba Company perfected its title to the Dakota lands which were subsequently relinquished in return for the lieu land privileges here the subject of dispute, the question between the parties was whether the grant of lands to the State of Minnesota, the Manitoba Company's predecessor, in aid of the building of a railroad from a point in Minnesota to a point in Dakota, included Dakota lands, and it was contended that there was an all pervading Government policy in regard to land grants to states in aid of railroads not to grant one state lands in another state, but the Supreme Court of the United States held that this all pervading policy could not control the express language of the statute apparently to the contrary. The Court said:

"We think that the language of those acts is too plain and unequivocal to need or even to admit the aid of an extrinsic rule of construction to get at the intent and meaning of congress. * * * Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department."

So here the clear inhibition of the statute that "no suit shall be brought" cannot be qualified by any theory of an all pervading Government policy.

It is, however, said in the brief that if, while acting under the railroad grant, the Land Department determines that certain lands are non-mineral and therefore issues a patent to the railroad covering such lands, the Department has exceeded its jurisdiction and acted unlawfully if the lands in fact contain mineral. The brief adds in this respect:

"There can be no doubt that the proviso in question, if taken literally and strictly, would forever bar any action to cancel a patent for such lieu lands no matter how entirely unlawful or ultra vires may have been its issuance. But we do not believe that Congress ever intended to throw its shield of protection over any such patent issued by the officers of the Government without authority of law."

Yet the brief further states that, in view of this policy in regard to mineral lands,

"it seems to us that, by this proviso, Congress

intended merely to protect patents to such lieu lands from attack for any mistake or irregularity of officers acting within the scope of their authority,"

and it is thus denied that in determining the mineral or non-mineral question, the officers of the Government are "acting within the scope of their authority."

We venture to point out that, in urging this forced construction, the complainant directly reverses itself. In the preceding argument it was contended that by the statute "there is nothing to indicate that Congress had in view a *selection authorized by an Act of Congress,* and which, if otherwise regular, needed no statute of limitations for its protection," and that "the proviso was intended to apply *only to lands which the company had no right* under the law *to select.*" In the present argument, on the contrary, in order to find some way by which the proviso may be nullified, complainant argues that the Act applies *only to "patents which were authorized to be issued."*

Passing by this inconsistency we think that a little further reflection will convince the complainant that the suggested interpretation goes too far. It was said that in view of the legislation in relation to mineral lands we are bound to assume that Congress in enacting this proviso had in mind these various enactments relating to the acquisition of mineral lands and the uniform policy of the government that mineral lands

should not be acquired under agricultural or railroad grants, and that if the land in question was in fact mineral land it could not be acquired except under the mineral laws, and that the patent in question, being a railroad grant patent, was, therefore, absolutely void, and was issued without authority of law and is not aided by the proviso which applies only to patents issued pursuant to authority conferred by law. If this contention is correct counsel must assert that it is equally applicable not only to the proviso but also to similar expressions used throughout the statute, and that it is equally applicable to the general statute of limitations set forth in the Act of '91. As already pointed out, no different expression is used in this proviso than is used in other parts of the statute in question and in the general statute of limitations, and hence whatever construction is adopted as to the proviso must be adopted as regards all of these statutes. Counsel will, therefore, be forced to assert not only that a railroad land grant to land which is in fact mineral is void and may be set aside at any time, but also that an individual's agricultural entry of land which is in fact mineral is void and may be set aside at any time, and further that an individual's mineral entry of land, which is in fact non-mineral, is likewise void and may be set aside at any time, since in each case it is true that there is an all pervading policy that mineral land shall not be acquired under agricul-

tural or railroad grants, and that agricultural lands shall not be acquired under mineral grants, and the one policy is not more sacred than the other.

Counsel would further be forced to assert that all of these patents, however ancient, could nevertheless be set aside at any time, and that there is no statute of limitations which properly construed, would forbid the maintenance of such suits.

This contention seems not unreasonable to those who are not familiar with mining localities and who doubtless assume that the mineral character of land is a mere matter of mathematics and who have never seen a prosperous farming country dotted with numerous adandoned shafts or cut by extensive tunnels, indicating the faith of some early prospector in the supposed mineral character of the country. The fact is, however-that it is a matter of very great difficulty to determine what is the actual character of a given tract of land, and this contention of the government that the validity of agricultural or railroad patents must depend upon the fact of the non-mineral character of the land, and that mineral patents must depend upon the fact of the actual mineral character of the land as the same may, at any time, be shown, would throw all government titles into confusion.

We might content ourselves with referring to the admission made in the brief that Con-

gress intended by the proviso "merely to protect patents for such lieu lands from attack for any mistake or irregularity of officials acting within the scope of their authority." Even if it could be assumed that by the expression "no suit shall be brought" Congress intended to permit some suits to be brought and we were to narrow the scope of the statute to the extent indicated on the theory that Congress intended, in the language of the brief below, "merely to protect patents from attack for any mistake or irregularity of officials acting within the scope of their authority," this case is directly within the statute as so construed. For it cannot be doubted that when the government officials determined that this land was non-mineral land and issued the patent in question they were undoubtedly acting within the scope of their authority, as the very selection of the land and the application for patent necessarily required them to determine the mineral character of the land. We may, therefore, accept the position taken by the complainant as to the limited scope of the proviso, and yet we find that the proviso expressly forbids the institution of this suit.

And the authorities cited by complainant themselves show that the officers of the Land Department, when so acting, are acting within the scope of their authority.

Reference is made by the Government to a case reported in 176 Federal where a patent was set aside for lieu lands issued in return for other lands within a Forest Reserve which were relinquished by the grantee, and it was said that it is difficult to see, on principle, why a different rule should prevail in the case at bar.

A controlling reason is that the Act of March 2, 1896, relates solely to lands certified or patented under railroad or wagon road grants, and the patent under consideration in the case referred to was not issued under such a grant; hence the proviso could have no application..

Thedifference is found in the statute. The Government has expressly declared that *no suit* shall be brought to annul patents to lieu lands that were certified or patented in lieu of other lands lost or relinquished by the grantee because of the failure of the Government, or its officers, to withdraw the same from sale or entry. The fact that Congress, in its enactment declaring the public policy of the nation, expressly included the case at bar is a sufficient reason for holding that the suit in question cannot be maintained without any necessity for inquiring why Congress did not extend that declared policy to other cases.

The suggestion is, at most, a reason for amending the Act in question so that it will include all lieu lands, for where the patent is issued, not in the nature of a gift, but as an ex-

change for lieu lands the title to which was unquestionable, it cannot be doubted that good faith and fairness requires that the title given in return should not be lightly questioned, or questioned at all, and undoubtedly if the patentee of the lieu land, before relinquishing the old land, had had its attention called to the litigation which might arise in the future it would have refused to make the exchange and give up a valid title for a title that could, at any time, be assailed. But, at any rate, the fact that Congress has not declared that this wise and moral policy shall apply to all cases is no reason for here denying the wisdom of Congress in recognizing that policy to the extent that Congress has declared that it shall be recognized, to-wit: In the case of lieu lands patented in lieu of other lands relinquished to cure mistakes of the land department.

In fact, however, it is not difficult to find a possible reason for the distinction. Perhaps Congress felt that it went far enough in declaring that those lieu lands should be favored which were patented in lieu of lands relinquished by the grantee because of the failure of the Government, or its officers to withdraw the same from sale or entry. Congress undoubtedly declared that as regards the danger of hostile litigation, lieu lands should be, to some extent, favored and perhaps Congress felt that it went far enough in limiting this favored class only to

those lieu lands which were certified or patented in lieu of lands relinquished to correct the mistakes of the government officers. There seems to be a reason for this distinction which is apparently made by the law-makers, for, as already pointed out, the proviso assumes that the patentee has already had more than its share of litigation and has suffered more than enough from the mistakes of the government and its officers. It was pointed out that, in the case at bar, the defendant, after years of litigation, had proved that its title to the Dakota lands was unassailable, and when afterwards it was requested to relinquish these lands to correct the confusion arising from the failure of the government, or its officers, to withdraw the same from sale or entry, and thus to relieve the resulting confusion the defendant company came to the aid of the government and corrected that confusion resulting from the government's own mistakes. It was, therefore, but proper for a gracious government in legislating upon the subject of suits to annul patents to provide that suits should not be brought to annul lieu land patents of the limited class here in question. The case reported in 176 Federal to which reference has been made is not at all a parallel case to this one, and the lieu lands referred to in that case were not within the favored class expressly provided for in the statute.

Counsel inquired whether the proviso would apply to a suit to annul a lieu land patent to a government fort issued by mistake on the part of the government officers. This suggestion is too far fetched and too impossible in actual life to be of any assistance. It might as well be assumed, as a helpful illustration in this discussion that a lieu land patent was issued under the Manitoba Company's act to a war-vessel. Reference to such an impossible case renders no assistance whatever.

But, as the question has been asked, we answer that, if the mistake was not of such a character that the minds of the officers of the land department did not act at all in the issuance of the patent, then, unquestionably, the proviso would defeat a suit to annul such a patent. Of course, if the mistake referred to is a clerical error, or if at the time when the patent was to be signed, one fraudulently substituted the wrong instrument and thereby the fort was granted, unquestionably this would be a case where, in fact, the minds of the officers of the land department had not operated and the so-called patent would not be a patent at all but would be a mere piece of waste-paper. Mistakes or frauds may be of such a nature as to prevent the mind of the party from operating at all in the transaction, as in a case, where at the time of the signature one instrument is fraudulently substituted for another. In such a case the instrument signed does not

constitute an act of the person signing and is mere waste-paper. A so-called patent signed under such circumstances would be no more a patent than if the officers of the land department should rise in their sleep and execute a patent. Such a suit would not be a suit to annul a patent as none in fact has ever been issued, but would be a suit to have a cloud on the title removed.

All of these instances, however, are of no assistance whatever because they do not arise in practice, but, if the question must be answered, unquestionably the proviso covers every case where the minds of the officers of the land department actually operate, and under the proviso the government must make its inquiries between the time of the filing of the selection and the time when the patent is issued, and, under the proviso, after the patent is issued, no suit shall be brought to set the patent aside.

The case of the granting of a government fort is no more startling, theoretically, than the case of the land referred to in the Chandler case, which we have cited, which land had been expressly reserved and the sale thereof forbidden. Moreover, as all of these statutes are couched in the same language, as has been heretofore so frequently observed, the question arises whether a patent of the United States to a fort would be barred under the general statutes of limitations within the period there prescribed. Under the

Chandler decision undoubtedly the statutes would apply to such a patent and this decision is, therefore, a direct authority that, under the proviso in question, all patents issued for lieu lands of the favored class referred to in the proviso are unassailable and that when Congress said that *no suit* should be brought, this does not permit some suits to be brought.

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APPELLEES POSITION NOW SUSTAINED BY TWO DECISIONS.

The opinion of the Court is, of course, found in the transcript. Judge Bourquin, however, merely followed the opinion of Judge Rasch, before whom the case as originally brought was first heard. As his opinion, likewise denying the right of the Governmnet to maintain the suit in its present form, never appeared in the Federal Reporter, we are taking the liberty of setting out such portions as are pertinent to the present discussion, in "Exhibit A" of this Brief.

We respectfully submit that Congress, recognizing the abundant merit of the claims of the Manitoba Company upon the Government, has enacted a wise and moral piece of legislation when it has declared that all inquiries as to the validity of the title to be conveyed in return for the relinquishment of lands relinquished to cure the Government's mistakes shall be prosecuted before the issuance of patent, and that after pat-

ent the title to the lieu lands shall be at least as unassailable as the title to the lands which were relinquished and that "no suit shall be brought" to annul the patents to lieu lands of the favored class which are here involved. We respectfully submit that no reason has been advanced why this express declaration of Congress should not be obeyed and that, on the contrary, good faith, fair dealing, wisdom and morality all demand that this direction of the legislative branch should be given full force and not needlessly and effectually nullified.

We call attention to the fact also that the question presented by the motion to dismiss attacks the very right of the Government to proceed at all with this litigation. Even, therefore, if the question involves some doubt, we submit that the two decisions on a question thus going to the foundation of the right to maintain the suit and decided adverse to that right should be affirmed, leaving the party who seeks to maintain the suit the right to have those decisions further reviewed, if deemed wise. An alternative decision in favor of the maintenance of the suit requires each of the parties to incur a great expense in a litigation which would ultimately be held to have been brought without authority of law, and further, as regards these defendants, we call attention to the fact that their costs thus forced upon them can never be recovered by reason of the sovereign character of the adverse party.

A decision in favor of the right to maintain this suit might result in useless costs being incurred in prolonged litigation disputing the matters set forth in the Bill, and these defendants, even when successful, would not be permitted to recover their costs. A decision against the maintenance of this suit, on the other hand, gives the adverse party full opportunity to have this fundamental question which arises at the outset determined by a court of last resort, and thereby saves to each of the parties the useless expense referred to.

For the reasons above set forth, the dceree should be affirmed. In the evest that there is any doubt upon the question, we think it a case typical of the instances where the matter should be certified to the Supreme Court, as the motion to dismiss raises a preliminary point practically questioning, or analogous to a question concerning the jurisdiction of the court to entertain the suit.

Respectfully submitted,

VEAZEY & VEAZEY,
Attorneys for Appellees.

EXHIBIT "A"

Judge Rasch, after setting forth the statute of 1896 already quoted, said in part:

"The section above mentioned in the Act of March 2nd, 1896, the limitation of which is extended to the patents referred to in the Act of March 2nd, 1896, is section 8 of the Act of March 3rd, 1891, which provides:

'That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.' 6 Fed. Stat. Ann., p. 526.

While the provisions of section 8 of the Act of March 3, 1891, are general, and, in the absence of other legislation inconsistent therewith, would have been applicable to patents issued under railroad grants, as well as to patents issued under any of the land laws of the United States, I take it that, in order to make the provisions of the Act of March 3, 1891, applicable to patents issued under railroad grants, it was deemed necessary to do so by additional legislation in view of the provisions of section 2 of the Act of March 3, 1887 (6 Fed. Stat. Ann., p. 435; 24 Stat. at L. 556), which authorized the institution of suits for the cancellation of patents erroneously issued, at any time after the expiration of ninety days from the date of demand for a reconveyance to the United States of the land so erroneously patented. 36 Cyc, 1151. Be that, however, as it may, the limitations of the Act of 1891 were extended and made applicable to patents issued under railroad grants by the Act of March 2, 1896, and the rules which govern in cases coming within the provisions of the earlier statutes must obviously be the same which control in cases aris-

ing under the later act. Complainant's contention, therefore, that the limitation prescribed by the Act of 1896, can only be invoked in cases where the patent was issued by inadvertence or mistake, and not where it was procured by fraud, can not be sustained. United States v. Winona etc. R. Co., 165 U. S. 463; United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447; United States v. Smith, 181 Fed. 545.

I agree also with counsel for defendants that so far as the Government itself is concerned, the action comes within the proviso of the Act of March 2, 1896, and it can not maintain it in its own behalf or in its own interest, and if it were not for the alleged rights of third parties, the demurrer should be sustained."